

**SEP 24 2003****NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. MCKELVEY,

Petitioner - Appellant,

v.

COMMISSIONER OF INTERNAL  
REVENUE,

Respondent - Appellee.

No. 02-74209

IRS No. 1971-00

**MEMORANDUM\***Appeal from a Decision of the  
United States Tax Court

Submitted May 7, 2003\*\*

Before: **SKOPIL**, **FERGUSON**, and **BOOCHEVER**, Circuit Judges.

Robert McKelvey appeals the Tax Court's ruling that he is not entitled to deduct various expenses relating to the development of his tree farm. We agree with the Tax Court that the claimed deductions are "start-up expenses" that are not immediately deductible. Accordingly we affirm.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

## **DISCUSSION**

In a preliminary matter, we agree with the Commissioner that McKelvey's notice of appeal is timely. A misdirected notice of appeal may be deemed timely by application of 28 U.S.C. § 1631, authorizing "federal courts to transfer appeals in civil matters in order to cure a lack of subject matter or appellate jurisdiction." Kolek v. Engen, 869 F.2d 1281, 1284 (9th Cir. 1989).

On the merits, the Tax Court correctly rejected McKelvey's claimed business deductions because he was not yet "carrying on a trade or business" as required by 26 U.S.C. § 162(c). The record indicates that McKelvey had only investigated the possibility of a tree farm by conducting studies and making a pilot planting. Even at the time of the Tax Court's decision, McKelvey had not planted trees, harvested trees, or even decided what trees to plant. Accordingly, the Tax Court did not err by ruling that McKelvey's expenses were start-up expenditures.

Finally, McKelvey seeks to renew arguments that he abandoned in Tax Court. We decline to address issues abandoned and not addressed by the lower court. See Harik v. California Teachers Ass'n, 326 F.3d 1042, 1052 (9th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3105 (U.S. July 11, 2003) (No. 03-89).

**AFFIRMED.**